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CHE HASAN SENAWI

v.

PP

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COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
HASAN LAH JCA
VINCENT NG JCA
[CRIMINAL APPEAL NO: K-05-59-2004]

C

22 JULY 2008

CRIMINAL PROCEDURE: *Sentence - Adequacy - Culpable homicide not amounting to murder - Sentence of 19 years imprisonment - Whether excessive - Guilty plea - Penal Code, s. 304(a)*

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The appellant had pleaded guilty to an offence of culpable homicide not amounting to murder under s. 304(a) of the Penal Code and was sentenced to 19 years imprisonment with effect from the date of his arrest. The appellant appealed against the measure of sentence imposed, and before the learned appellate

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judges the sole issue that arose was whether there was merit in the appeal.

Held (dismissing appeal)
Per Gopal Sri Ram JCA delivering the judgment of the

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court:

(1) The appellant had pursued the victim to her home and had killed her with a hammer. The medical evidence showed that the victim died from a single blow to her head. Under these

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circumstances, it can hardly be contested that the offence was committed in a most brutal fashion. Further, the facts placed before the court revealed that there was no provocation offered by the victim. (paras 3 & 4)

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(2) Whether a plea of guilt constitutes a mitigating factor would depend on the facts and circumstances of a particular case. However, where there is a course of circumstances similar to those that have occurred here, a plea of guilt, having regard to the seriousness of the case, carries little weight. (para 6)

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(3) Ordinarily, in a case of this sort, the maximum sentence of 20 years would have been imposed. It is entirely possible therefore that the sentence of 19 years imposed reflects the intention of the learned judge to take into account the appellant's plea of guilt. (para 7)

Bahasa Malaysia *Translation Of Headnotes*

Perayu mengaku bersalah terhadap kesalahan hoimisid salah tidak sampai membunuh di bawah s. 304(a) Kanun Keseksaan dan telah dihukum 19 tahun penjara bermula dari tarik beliau ditangkap. Perayu merayu terhadap keberatan hukuman, dan di hadapan yang arif hakim-hakim rayuan persoalan tunggal yang berbangkit adalah sama ada rayuan perayu bermerit ataupun tidak.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Perayu telah mengejar mangsa hingga ke rumah mangsa dan telah membunuhnya dengan menggunakan penukul. Keterangan perubatan menunjukkan bahawa mangsa mati kerana satu hentakan ke kepalanya. Dalam halkeadaan sedemikian, ianya tidak boleh dinafikan bahawa jenayah telah dilakukan dengan cara yang amat kejam sekali. Selain itu, fakta seperti yang dibentang di mahkamah menunjukkan bahawa tiada sebarang provokasi telah dilakukan oleh mangsa.

(2) Sama ada sesuatu pengakuan bersalah itu menjadi faktor bagi keringanan hukuman akan bergantung kepada fakta dan halkeadaan sesuatu kes. Bagaimanapun, di mana wujud halkeadaan yang serupa sepertimana yang berlaku di sini, suatu pengakuan bersalah, mengambilkira keseriusan kes, tidak memberi banyak kesan.

(3) Biasanya, dalam kes seperti ini, hukuman maksima 20 tahun akan dijatuhkan oleh mahkamah. Oleh yang demikian, adalah mungkin bahawa hukuman 19 tahun penjara seperti yang dijatuhkan oleh yang arif hakim di sini telah mengambilkira pengakuan bersalah perayu.

Case(s) referred to:
Fu Foo Tong v. PP [1995] 1 SLR 448 ***(refd)***
Mohamed Abdullah Ang Swee Kang v. PP [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 SC ***(dist)***
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(refd)***
Sim Gek Yong v. PP [1995] 1 SLR 537 ***(refd)***

Legislation referred to:
Penal Code, ss. 302, 304(a)

For the appellant - Loo Yook Khin; M/s BC Teh & Yeoh
For the respondent - Fatnin Yusof; DPP

[Appeal from High Court, Alor Star; Criminal Trial No: 45-01-2002]

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Gopal Sri Ram JCA:

[1] This is the judgment of the court.

[2] The appellant was originally charged for the offence of murder under s. 302 of the Penal Code. However, at the commencement of his trial an amended charge under s. 304(a) of the Penal Code was tendered by the prosecution. The accused pleaded guilty to the amended charge. He was sentenced to 19 years imprisonment with effect from date of arrest. He has appealed to us on the measure of sentence. His complaint is that the sentence is manifestly excessive.

[3] The facts of this case are straightforward. The victim, a lady was on her way home when she was accosted by the appellant who was riding a motorcycle. He made advances to her which she repelled. She then ran into her home and was pursued by the appellant who killed her with a hammer. The medical evidence shows that the victim died from a single blow to her head. Under these circumstances it can hardly be contested that the offence was committed in a most brutal fashion. It was suggested by learned counsel for the appellant that there was provocation in this case. It was also submitted that the sentencing court had taken into irrelevant considerations and failed to take into account relevant considerations when passing sentence upon the appellant.

We have scrutinised the record most anxiously, in particular the judgment under the appeal and we find no merit whatsoever in this complaint.

[4] The facts placed before the court below revealed that there was no provocation offered by the victim. If any provocation was offered, it came from the appellant.

[5] Learned counsel has also argued, citing a number of authorities in support, that the appellant being a first offender, his plea of guilt ought to have entitled him to about one third discount when determining the measure of sentence. The decision of the Supreme Court in *Mohamed Abdullah Ang Swee Kang v. Public Prosecutor* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 was relied upon in support of this submission. We would note at once that *Mohamed Abdullah Ang Swee Kang v. Public Prosecutor* was a case concerning criminal breach of trust and not a violent crime. And, as Hashim Yeop A. Sani J (later Chief Justice of Malaya) said in *Public Prosecutor v. Loo Choon Fatt* [1976] 2 MLJ 256, when it comes to the imposition of punishment, each case depends on its own facts.

[6] In our judgment whether a plea of guilt constitutes a mitigating factor would depend largely on the facts and circumstances of a particular case. Where there is a course of circumstances similar to those that have occurred here, a plea of guilt, having regard to the seriousness of the case, carries little weight. As Karthigesu JA said when delivering the judgment of the Court of Appeal of Singapore in *Fu Foo Tong v. Public Prosecutor* [1995] 1 SLR 448:

> It is not axiomatic that every plea of guilty 'entitles', as it was contended by counsel to a discount of between one-quarter to one-third of what might otherwise be considered an appropriate sentence after a trial. A plea of guilt can be of no mitigating value, for example, when the evidence overwhelmingly supports a conviction.

[7] Ordinarily in a case of this sort the maximum sentence of 20 years would have been imposed. It is entirely possible that the sentence of 19 years imposed reflects the intention of the learned judge to take into account the appellant's plea of guilt.

[8] In our judgment, the correct approach to be taken where the maximum or near maximum sentence is warranted is that set out in the judgment of Yong Pung How CJ in *Sim Gek Yong v. Public Prosecutor* [1995] 1 SLR 537. The learned Chief Justice of Singapore expressed a view with which we respectfully agree. This is what his Honour said:

> The principles espoused above in *R v. Tait and Bartley* [1979] 24 ALR 473 and *Bensegger v. R* [1979] WAR 65 represent, in my view, the approach which should be adopted by a court towards the issue of maximum sentences. To restrict the maximum sentence to the 'worst case imaginable' would only invite an endless permutation of hypotheses. In the appellants' case, for instance, would the 'worst case imaginable' be one in which the custom officers had been injured? Or would it be one in which one of the officers had been killed? Or would it be one in which an innocent bystander had been fatally hit by the appellant's car? The possibilities are limitless and the uncertainty intolerable. All that a court can realistically do – and all that it should do – when deciding whether or not to impose a maximum sentence is to identify a range of conduct which characterizes the most serious instances of the offence in question. This would, as the court in *R v. Tait and Bartley* pointed out, involve consideration both of the nature of the crime and of the circumstances of the criminal.

[9] Taking into account all that has been said on the appellant's behalf we are unable to detect any appealable error on the part of the learned trial judge. In our judgment the sentence imposed is not manifestly excessive. The appeal is accordingly without merit. It is dismissed. The orders made by the High Court are affirmed.